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DEC 22

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 523.

CENTRAL TRANSFER COMPANY,
PETITIONER,

v.

TERMINAL RAILROAD ASSOCIATION
OF ST. LOUIS *et al.*,
RESPONDENTS.

PETITIONER'S REPLY BRIEF.

GLENDY B. ARNOLD,
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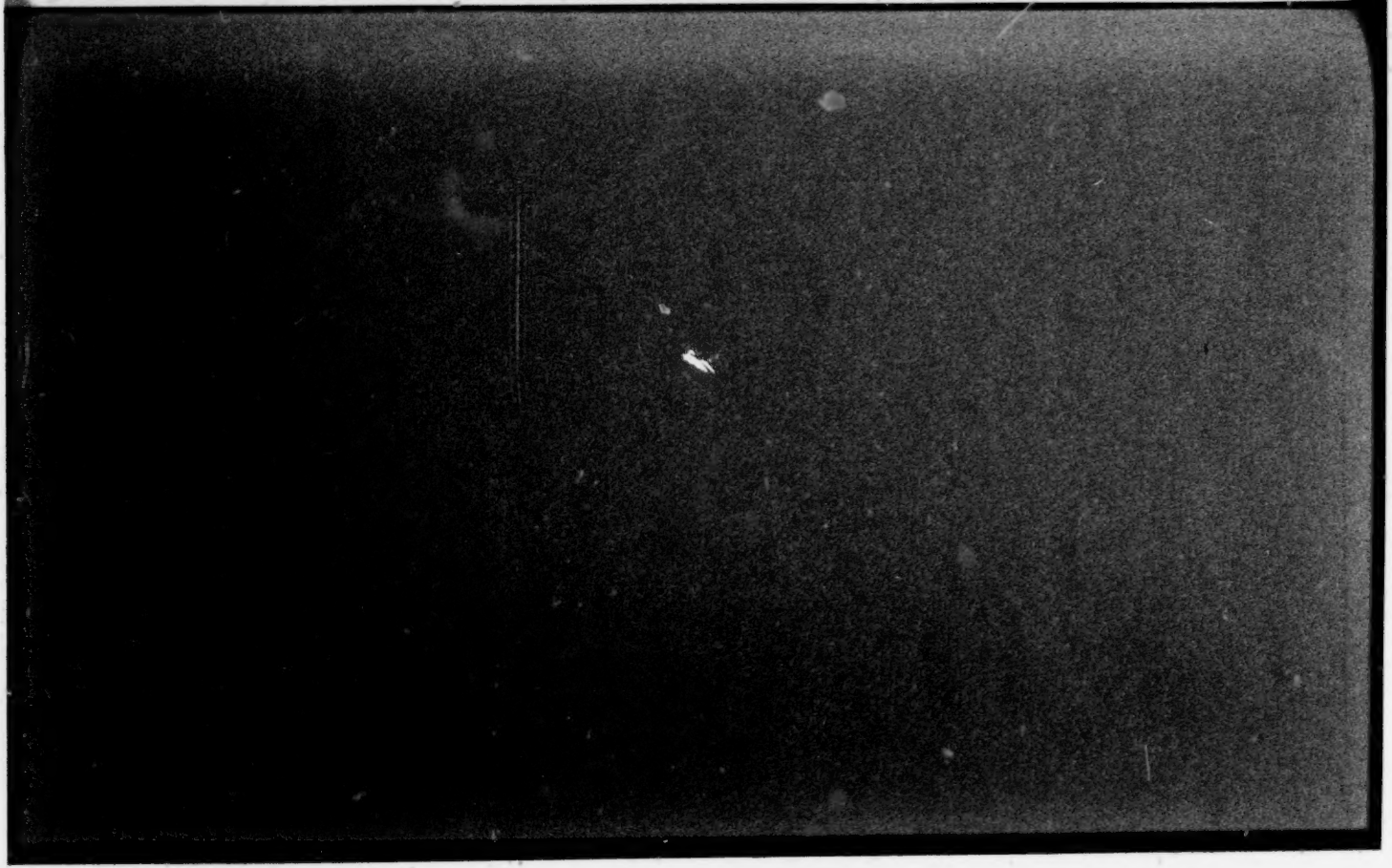

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COMMENTS ON RESPONDENTS' STATEMENT.

I.

With an unimportant exception, no statement of fact in petitioner's statement of the matters involved is denied or disputed by the respondents' statement, nor is the legal effect of petitioner's statement of the facts in anywise altered by the supplemental matter in respondents' statement. Therefore, our statement of the matters involved amounts to an agreed statement of facts upon which the decision of the Court is to be based.

II.

Respondents (page 1) say: "This controversy has to do with methods employed by the carriers," etc. Respondents are still thinking of the case before the Commission. We are not concerned here with "methods," but only the legal right of respondents to combine to fire petitioner.

III.

At pages 3, 4 and 7 respondents undertake to justify their action in destroying the business of petitioner and other competitors of the Columbia by saying that certain abuses and waste had grown up in the handling of the traffic, and point to large savings to result from the elimination of competition. The abuses and waste consisted of a **clamor** for recogniton by other transfer companies than those employed and the employment of soliciting forces by the companies performing the services to solicit business in competition with each other. Neither the abuses or waste nor the savings are a defense here, and no combination or monopoly was necessary to put an end to the alleged abuses and wastes, for respondent carriers had the same power and control over the four transfer companies as they now have over the one.

Respondents would have us believe that by employing the Columbia Company the Missouri Pacific and Frisco and other west-side lines would wholly or partially abandon the use of certain off-track stations, and thereby save annually $125,000, but the record affirmatively shows that it was not necessary to destroy the business of the Columbia's competitors in order to effect these savings (R. 75). So the only justification left is the annual savings resulting from a reduction in the Columbia's rates, but that is no defense for violation of the Antitrust Act.

IV.

The carrier respondents would also have us believe that the one-transfer plan was a railroad plan, but Mr. Commissioner Eastman was of a different opinion. In his separate report (R. 123) he said:

> "It appears that it (the one-transfer plan) has been conceived and negotiated in part under the auspices of officers of respondents who had and have a direct financial interest in the Columbia Terminals Company or an affiliated company. I do not at all agree with the majority in passing lightly over this espisode. It was without excuse whatever the outcome of the negotiations."

The learned Commissioner then goes on to show the hand of the Columbia in the work of the combination.

Mr. Hart of the Baltimore & Ohio, a stockholder in the Columbia, was one of the original and ardent advocates of the plan (R. 43, 65). (See also R. 62.) Some idea of the Columbia's interest in promoting the combination may be gathered from the fact that it paid $375,000 just to silence the opposition of two of its competitors (R. 65), and was willing to buy out this petitioner just to silence it (R. 67, 68). It paid $250,000 for the equipment of the Fidelity Transfer Company and $125,000 for a controlling interest in the McMahon Company (R. 65) when it did not need the equipment of either (R. 74), and would take over all of their railroad hauling under its contract.

V.

We concede the venial error of stating, at page 2 of our petition, that a preliminary injunction was issued by Judge Otis. It was a temporary restraining order.

RESPONDENTS' ARGUMENT.

I.

At page 18 respondents stress the fact that Section 6 of the Interstate Commerce Act requires them to designate these off-track stations in their tariffs. That section lays no such burden upon members of a conspiracy.

II.

Respondents, page 19, say: "If respondents are enjoined from carrying out the provisions of the contract attacked, what becomes of the tariffs on file with the Commission?" The answer: The tariffs would have been withdrawn as a necessary act of obedience to the injunction, and that would have left the old tariffs in effect, with petitioner's stations designated therein. At the time of the trial petitioner was still in the employ of respondents. In such circumstances there would have been no occasion for filing any new tariffs or for any order to "restore the places of business of petitioner as off-track stations," as suggested by respondents.

III.

As respondents say, page 20, we did and do now concede that the Commission has jurisdiction of the services of these transfer companies, and we assert again, and respondents now concede, that the Commission "has no jurisdiction to control the carriers' discretion in selecting their agents to perform the service." We now suggest: **If the Commission has no jurisdiction of this discretion of the carriers, has the Commission any jurisdiction of a cause of action arising out of the unlawful exercise of such discretion? We say no.**

IV.

At pages 20 and 21 respondents call attention to the appellate court's statement of our theory of the case. We have the following comments to make on the quotation respondents have made there from the opinion of the Court of Appeals:

(a) We think that paragraph of the Court's opinion erroneous. We respectfully submit that the learned court misconceived our theory, and we believe that fact is shown by our statement of the facts in the petition for the writ of certiorari, the statement of the facts contained in the bill, the prayers for relief, as stated in the bill (R. 10) and suggested, in our brief, to the appellate court (R. 179-180).

(b) We do not think the record shows that the "cost" of the services performed by the transfer companies is "reflected in the rates contained in the tariffs filed with the Commission." The **allowances** paid transfer companies are not mentioned in the tariffs, and the reduction of the Columbia's rates is not reflected in the line haul rates.

(c) We find no contention in our briefs to the effect that the agreement for the services of the Columbia is not a matter subject to the jurisdiction of the Commission. What we said was that the combination and its oral agreement to fire petitioner are not within the jurisdiction of the Commission, and, therefore, a suit to enjoin its performance is not one in respect of a matter within the jurisdiction of the Commission.

(d) We can find no assertion and recall none to the effect "that the Court may prevent the carrying out of the contract (Exhibit 10) without affecting the services to be performed or the rates to be charged for such services."

If we ever made such a contention it was an obvious error, and we do not repeat it here for the plain reason that the relief we sought would have necessarily affected the services to be performed by the Columbia, under Exhibit 10, but only to the extent of preventing it from taking over the business of petitioner. If we had won, shippers would have continued as they had done for many years, to use the Columbia's stations as well as ours. We do not understand how it was possible for us to have made the assertion ascribed to us by the appellate court.

(e) We have never contended that "the Court can enjoin the carriers from establishing off-track stations at the places of business of the Columbia, as provided by the contract, but leave the tariffs designating such stations undisturbed." We only sought to prevent abandonment of petitioner's stations, and, obviously, that could have been done without **disturbing** the Columbia's stations, as designated in the tariffs, both old and new. We do not recall ever having thought of or suggested that the Court could "enjoin the carriers from establishing off-track stations at the places of business of the Columbia."

(f) We have never contended that the "Court may enjoin the carriers from employing the Columbia as their sole transfer agent, and yet leave undisturbed the service which the Columbia is to perform for the carriers at a stipulated cost, as well as the tariffs which reflect the cost of service." Our contention was that they cannot combine to fire us. Of course, the relief sought, if granted, would have disturbed the services **to be** performed in the future under Exhibit 10, but only to the extent stated in paragraph (d) above. Certainly that relief would have forced a withdrawal of the tariffs eliminating petitioner's stations.

Naturally the Columbia would not have been the sole agent if we had won.

We do not think the "Court of Appeals correctly describes our theory of the case," as respondents say.

V.

At page 22 respondents say "that this controversy, being one of rates and transportation under such rates, is for the Commission." No rates are involved.

VI.

At pages 24 and 25 respondents' statement that we contend the Commission has no jurisdiction over the contract by which the carriers employed the Columbia is erroneous. We have stated repeatedly that the Commission has jurisdiction over the services called for in that contract, and to that extent it has jurisdiction of the contract itself, but that is not saying that there may not be provisions of the contract over which the Commission has no jurisdiction. In fact, there are two such provisions in this contract. They are contained exclusively in the words "only" and "all" in paragraphs 25 and 26, respectively, of Exhibit 10 (R. 52), which impliedly obligate the carriers to discontinue their employment of petitioner. Agreement upon and performance of those provisions are matters over which the Commission has no power or control.

VII.

At page 32 respondents say that Moore v. New York Cotton Exchange et al. "is not even remotely analogous to the case at bar." They ignore the facts that two of the defendants in that case were common carriers subject to the provisions of the Interstate Commerce Act, and that

the contract between those carriers and the New York Cotton Exchange, which gave rise to the controversy, provided for the interstate transmission of telegraphic information, a subject matter generally within the regulatory powers and jurisdiction of the Commission, and that it was a case to cancel said contract as violative of the Sherman Antitrust Act.

At page 39 respondents, "to refute the assertion that the purpose of the one-transfer plan is to destroy the business of petitioner," quote testimony to show that "one purpose of the carriers in arriving at the one-transfer plan is to determine for themselves where the off-track station should be located and who should operate it." That testimony is obviously incorrect. No combination was necessary to enable respondents to do that. They cite a number of cases upholding that power in **each** carrier.

VIII.

Beginning at page 43 much space is consumed by respondents to demonstrate that a carrier "has full liberty to select its own agents to perform transportation service on its behalf," a proposition never controverted by us at any time. Eight pages (43-50) are devoted to a discussion of Skaggs et al. v. Kansas City Terminal Railway Co. et al., 233 Fed. 827, and Donovan v. The Pennsylvania Co., 199 U. S. 280. A great number of other cases are cited to sustain this contention and grouped with the Skaggs and Donovan cases at page 16 of respondents' brief.

An examination of those cases will disclose that they are inapplicable to any legal point or proposition in petitioner's case. They involve the right of individual railroads and a terminal company, at common law, to make

exclusive contracts for the use of **company property** for carrying on the taxicab and express business, for the interchange of freight by connecting carriers, and for the hauling of freight by a transfer company. The Serman Act was involved in only one of them, the Skaggs case. No unlawful combination or conspiracy to destroy the business of a private corporation was charged in any of them.

Respondents seem to think that what one carrier may do in making exclusive contracts with taxicab and transfer companies, a number of carriers may combine and do when the intended result is to destroy the private interstate business of an individual or a private corporation.

IX.

Respondents, beginning at page 51, make a long analysis of United States v. Terminal Railroad Assn., 224 U. S. 383, and quote from the report of the Interstate Commerce Commission (R. 99) to sustain their contention that that case is authority for what they have done in this case. They do not, however, answer the contention that this Court held in the Terminal case that the proprietary lines could not agree among themselves to give all of their switching business to the Terminal Association, their jointly owned facility. That is the only proposition in the Terminal case in which we have any interest.

We have always thought, and contended in the Court of Appeals, that the construction of the Terminal case by the Interstate Commerce Commission was erroneous, but whether erroneous or not the conclusions of the Commission in regard to that case are not applicable here. In the proceedings before the Commission, the Chamber of Commerce, one of the protestants, urged upon the Commission the contention that, on the record there before it, the

combination and its **oral agreement** involved in the instant case were in violation of the Sherman Antitrust Act (R. 99). However, the Commission's report shows that, legally, no such case as is presented here was presented to the Commission by either the Chamber of Commerce or this petitioner. The Chamber of Commerce argued the matter from a public standpoint, and not in defense of the rights of any particular private party to that proceeding. It is quite clear that the Commission considered only the effect of the monopoly upon the general public interest, and gave no weight to its effect upon the private business of this petitioner.

If we have correctly construed the Terminal case at pages 31-33 of our brief in support of the petition, then we are confident that the conclusions of the Commission in regard to that case can have no bearing on this case.

X.

Disposition of the Case.

We do not think that respondents have demonstrated that this case should not be transferred to the law side of the court if the Court holds that the petitioner has not the right to bring the suit.

If the case is one for the law side of the court we have not lost our right to have it transferred by failing to move below to have that done (Diamond Alleoli Co. v. P. C. Thomson & Co., 35 Fed. [2d] 117, 120).

XI.

Our Own Errors.

We wish to correct two errors in our original brief in support of the petition.

At page 23 we inadvertently stated that Moore v. New York Cotton Exchange et al. was a suit "to enjoin a threatened violation of the Antitrust Acts" and "to enjoin threatened violations of the Antitrust Acts." At page 603 of the opinion of this Court in that case it is stated:

> "The prayer is for a decree canceling the Western Union contract, adjudging the New York Cotton Exchange to be a monopoly, restraining appellees from refusing to install a ticker and furnish the Odd-Lot and its members as they do others, with continuous cotton quotations, and for other relief."

We have requested the clerk to ink out the word "threatened" in the sixth line from the top of page 23 of our brief, and the same word in the line next to the last one on said page.

At page 36 of our brief, in the ninth line from the top of the page, the word "intrastate" should be "interstate," and we request the clerk to make this correction.

Respectfully submitted,

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December 20, 1932.